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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO ESTRADA,

Defendant and Appellant.

2d Crim. No. B299952
(Super. Ct. No.
F000104835001)
(San Luis Obispo County)

Gerardo Estrada appeals an order denying his Penal Code¹ section 1170.95 petition for resentencing of his prior first degree murder conviction. (§§ 187, subd. (a), 189). We conclude, among other things, that the trial court erred by summarily denying the petition without issuing an order to show cause for an evidentiary hearing. We reverse and remand for further proceedings.

FACTS

In 1987, Estrada pled guilty to murder in the first degree. (§ 187.) Before he made that plea, the People advised the trial

¹ All statutory references are to the Penal Code.

court that another defendant “actually killed the victim in this case.” The victim who ultimately died was assaulted during the commission of a burglary. The People claimed Estrada was “culpable” under the former “felony murder” rule. Pursuant to a plea agreement, the People agreed to dismiss, among other things, the charged burglary counts and the “special circumstances allegations.” The court sentenced Estrada to a state prison term of 25 years to life.

On November 28, 2018, Estrada filed a petition for resentencing under section 1170.95. In that petition he declared, “I was convicted of 1st degree felony murder and I could not now be convicted because of changes to Penal Code § 189, effective January 1, 2019, for the following reasons . . . : [1] I was not the actual killer. [¶] [2] I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree. [¶] [3] I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony.”

In an additional brief in support of his petition, Estrada claimed he “was not present in [the victim’s] home to observe [E.C., the actual killer] strike the lethal blows to [the victim].” He claimed he attempted to discourage E.C. from engaging in violent conduct and urged him “to leave the home.”

The probation report reflects that Estrada told police that he did not agree with E.C.’s conduct. Estrada claimed that during the burglary he “became afraid and *left the house*.” (Italics added.) He did not see E.C. assault the victim.

The trial court summarily denied the section 1170.95 petition. It did not issue an order to show cause for an

evidentiary hearing. Instead, the court relied on its review of the preliminary hearing transcript to find that Estrada did not make a prima facie showing for section 1170.95 relief.

DISCUSSION

The Section 1170.95 Petition

Estrada and the People agree that the trial court erred by denying the section 1170.95 petition without issuing an order to show cause. They claim: 1) Estrada was not ineligible for relief as a matter of law; 2) Estrada stated facts sufficient to show a prima facie case for relief; and 3) the trial court prematurely made ultimate factual findings from its review of a preliminary hearing transcript without providing the parties an opportunity to present new evidence at an order to show cause evidentiary hearing. We agree.

In 2018, the Legislature passed Senate Bill No. 1437. It authorized a procedure for those convicted of first or second degree murder to petition for resentencing. (§ 1170.95.) It changed the standard for first degree or second degree murder convictions (§§ 188, 189) based on the felony murder rule or the natural and probable consequences doctrine. “These changes, which the Legislature adopted in 2018 in Senate Bill 1437 and which went into effect on January 1, 2019, ensure that murder liability is not imposed on a person *who is not the actual killer*, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147, italics added.)

Section 1170.95, subdivision (a) provides, in relevant part, “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the

court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)-(3).)

Section 1170.95, subdivision (c) provides: "The court shall review the petition and determine *if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section*. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (Italics added.)

The first step in the section 1170.95 procedure requires the petitioner to make a prima facie showing that he or she is eligible for relief. If a prima facie showing is made, the trial court proceeds to the second stage and issues an order to show cause for a hearing. At the hearing, "[t]he prosecutor and the petitioner may rely on the record of conviction or *offer new or additional evidence to meet their respective burdens*." (§ 1170.95, subd. (d)(3), italics added.) "[T]he burden of proof shall be on the

prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.” (*Ibid.*)

Courts have held that where the petition is frivolous or the petitioner is categorically ineligible for section 1170.95 relief, the trial court may summarily dismiss the petition. (*People v. Cervantes* (2020) 44 Cal.App.5th 884, 887; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 329-330, review granted Mar. 18, 2020, No. S260493; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58, review granted Mar. 18, 2020, No. S260410.)

In certain cases the court may determine that a defendant is categorically ineligible for section 1170.95 relief from the record of conviction and the jury’s special circumstance findings. This is not such a case. Here the case did not go to trial because of the plea, and consequently there are no special circumstance findings. The People dismissed the special circumstance allegations and advised the court that Estrada was not the actual killer. Estrada’s liability for murder was based on the former felony murder rule. His petition included facts to make a prima facie showing that he was not ineligible for relief under section 1170.95.

The trial court relied on the preliminary hearing transcript to conclude that Estrada was ineligible for section 1170.95 relief and not entitled to the issuance of an order to show cause. But at the first stage of the section 1170.95 proceeding, the preliminary hearing transcript may not provide a sufficiently complete record to base a finding that a defendant is categorically ineligible for relief. This is particularly the case where that record does not include evidence involving the defendant’s awareness of the dangers posed by the crime and his or her subjective knowledge that “the felony involved a grave risk of death.” (*People v. Banks*

(2015) 61 Cal.4th 788, 807.) Or where that record does not contain sufficient evidence of the defendant's "awareness of the past experience or conduct" of the killer. (*People v. Clark* (2016) 63 Cal.4th 522, 614.) Fact finding on these issues is properly conducted in the second stage of the section 1170.95 procedure after the issuance of the order to show cause when both parties have an opportunity to present new evidence. The trial court may consider the preliminary hearing transcript along with the other evidence the parties present at that second stage. Here the court prematurely made the evidentiary findings.

DISPOSITION

We reverse the order and remand the case to the trial court with instructions to issue an order to show cause and proceed consistent with the procedure required by section 1170.95.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Craig B. Van Rooyen, Judge

Superior Court County of San Luis Obispo

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